

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WIXT-TV, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Period March 1, 1982	:	
through November 30, 1986.	:	

Petitioner, WIXT-TV, Inc., 5904 Bridge Street, East Syracuse, New York 13057, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1982 through November 30, 1986 (File No. 805576).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York, on January 25, 1989 at 1:15 P.M. with all briefs to be filed by April 24, 1989. Petitioner appeared by Eric M. Rubin, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUES

- I. Whether petitioner filed a sales and use tax return for the quarter ending May 31, 1982.
- II. Whether the period of limitation for the determination of sales and use taxes due resulting from petitioner's purchase in bulk of the assets of WIXT-Television, Inc. expired prior to the issuance of the Notice of Determination and Demand for Sales and Use Taxes Due.

FINDINGS OF FACT

On March 13, 1987 the Division of Taxation issued to WIXT-TV, Inc. (hereinafter "petitioner") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which advised petitioner that, based on an audit of its records, additional tax in the amount of \$785,888.06 plus interest was due for the period March 1, 1982 through November 30, 1986.

The Division of Taxation conducted a field audit of petitioner's business operation. Inasmuch as the Division determined petitioner's records to be adequate, a detailed audit was performed except for those aspects for which petitioner elected to permit the use of a representative test period audit method by execution of an Audit Method Election (Form AU-377.12).

The audit findings were as follows:

Category

Additional tax due

Sales of master tapes	\$ 44,495.57
Recurring expenses	246,833.58
Bulk purchase	468,212.47
Other fixed asset purchases	<u>26,346.44</u>
Total tax due	\$785,888.06

On November 23, 1987, representatives of petitioner and the Division of Taxation participated in a conciliation conference conducted by the Department of Taxation and Finance, Bureau of Conciliation and Mediation Services. The conference resulted in the issuance of a Conciliation Order on February 19, 1988, which reduced the original determination by \$92,728.50 to \$693,159.56. The reduction reflects the cancellation of tax assessed on expenses incurred by petitioner for the receipt of satellite transmissions. The conferee sustained the original determination in all other respects.

Petitioner does not dispute the tax determined to be due on sales, expenses and acquisitions other than the initial purchase of the assets of WIXT-Television, Inc. on or about May 7, 1982. While denying liability, petitioner does not take issue with the computation of that amount. Thus, the dispute in this proceeding concerns liability for tax in the amount of \$468,212.47 plus interest.

On or about May 7, 1982 petitioner purchased the assets of WIXT-Television, Inc., a broadcast television station. Petitioner's operation of the station commenced immediately and continued throughout the audit period.

Among other activities, the station was involved with sale of production services and master tapes as well as the sale and barter of commercial air time.

Although petitioner purchased the assets and began operation of the station in May of 1982, it did not apply for a certificate of authority or register as a sales tax vendor until some 18 months later, in November of 1983. Petitioner has not filed with the Division of Taxation a Notification of Sale, Transfer or Assignment in Bulk (form AU-196.10) regarding the purchase.

On September 20, 1983, petitioner filed sales and use tax returns (form ST-100) for the quarters ending August 31, 1982, November 30, 1982, February 28, 1983 and August 31, 1983. On October 4, 1983 petitioner filed a Sales and Use Tax Return for the quarter ending May 31, 1983. Each of these documents had a preprinted label affixed containing the corporate name and identification number of WIXT-Television, Inc.. A single line was drawn through the preprinted name and identification number. The name and Federal identification number of petitioner was entered in the area of the return reserved for corrections of the preprinted label.

When the Division of Taxation receives returns or payments from vendors which are not registered, they are held in a separate unit of the Division. Processing is suspended until such time as the payments or returns can be associated with a registered vendor.

Neither party could produce a copy of a return filed for the quarter ending May 31, 1982. However, the person who was the controller of both petitioner and the predecessor corporation credibly testified with regard to the circumstances surrounding a filing for that period of time. Specifically, this testimony established that the controller's office prepared and filed a sales and use tax return for the quarter ending May 31, 1982; that the return included taxes due from both WIXT-Television, Inc. and WIXT-TV, Inc. (petitioner); that payment of \$13,852.80 was made with the return by check drawn on WIXT-TV, Inc. (petitioner); that the return had a preprinted label affixed containing the corporate name and identification number of WIXT-Television, Inc.

(the predecessor corporation) and that, unlike the returns filed in 1983, the name and identification number of petitioner were not entered on the form in any fashion.

On at least three occasions during 1982 and 1983 notice of determination and demand documents (form ST-560) were issued to the predecessor corporation indicating that sales tax returns had not been received. While setting forth estimated taxes due, the notices also provided that "if a return is not required, please complete the reverse side of this form."

At hearing, petitioner offered office copies of the aforesaid notices. On two of the three documents the notation was made on the reverse that the business had been sold on May 6, 1982 and that the new business name and address was "WIXT TV, INC. 1111 Third Avenue Seattle, WA 98101". The form also included a space for marking yes or no after the question "Was Sales tax collected on sale of business?". Neither box was checked on the copies offered by petitioner.

SUMMARY OF THE PARTIES' POSITIONS

14.(a) Petitioner contends that the filing of the return for the quarter ending May 31, 1982 purportedly setting forth the liabilities of both of the entities which were operating the television station during the quarter, but bearing the name and identification number of the predecessor corporation only, fulfilled the filing requirements for each under the law. Consequently, petitioner postulates, the period of time within which the Division of Taxation must, if at all, assess additional tax commences upon that filing and expires three years later in accordance with section 1147 of the Tax Law.

(b) Petitioner also points to "repeatedly filed ST-100s and ST-560s" and "direct conversations" with the Division of Taxation as evidence that the Division had not only constructive, but actual notice of the fact that petitioner was carrying on business.

15. The Division of Taxation takes the position that petitioner's failure to file a separate sales tax return for the quarter ending May 31, 1982 prevented the statute of limitation from commencing regarding that period and that the delay of over a year and a half in registering as a sales tax vendor together with the failure to file a notification of bulk transfer vitiates any notice, constructive or otherwise, the Division may have had regarding the activities of petitioner.

CONCLUSIONS OF LAW

A. Petitioner has the burden of proving each aspect of the audit determination herein to be improper. While testimony and documents were offered regarding the filing of a return for the quarter ending May 31, 1982, no proof was presented to rebut the correctness of the audit methodology or the amount of tax brought forward from the conference level. Given the presumption of correctness which attaches to tax assessments (see, Matter of Cousins Service Station, Tax Appeals Tribunal, August 11, 1988), except as set forth in paragraphs 4 and 5 of the findings of fact herein, the substantive audit findings must be sustained as unchallenged.

B. The liability in question here concerns the tax due specifically upon the tangible personal property transferred by WIXT-Television, Inc. to petitioner, to wit, \$468,212.47 plus interest. The liability arises not because of the unique nature of a bulk sale transaction but instead due to the simple fact that the receipts from the sale of tangible personal property are generally subject to sales tax. (See Tax Law §§ 1105(a); 1101(b)(4); see also, Matter of Harbor Vue Cable TV, Inc., State Tax Commission, May 27, 1983 [where even though a bulk purchaser was relieved

of responsibility for the seller's liability by compliance with the requirements of section 1141(c) of the Tax Law it was, nonetheless, held responsible for taxes due on the tangible personal property transferred].) In the instant case, petitioner could have paid the tax due either to the seller in the bulk transfer or directly to the former State Tax Commission. In the latter situation, however, the petitioner would be held to the duties of a customer paying directly as set forth in section 1133(b) of the Tax Law "to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid." There is no proof or argument in this matter that petitioner paid the tax to the seller; nor is there a claim that the petitioner paid the tax directly to the former State Tax Commission.

C. In addition to petitioner's obligations as a direct paying customer under Tax Law § 1133(b) to file a return, it was also required to file on at least two other grounds. First, as a vendor of taxable goods and services (e.g., sale of production services and master tapes), petitioner was a "person required to collect tax" since it commenced business in May of 1982. (Tax Law § 1131[1].) As such, it was required to register and file returns. (Tax Law §§ 1134(a)(1); 1136.) In addition, as the purchaser in bulk of the assets of WIXT-Television, Inc., petitioner was required to notify the Tax Commission of the price, terms and conditions of the transaction at least ten days in advance of taking possession of the assets or paying for them. (Tax Law § 1141[c].) While this requirement was clearly intended to serve the purposes of notifying the Division so that tax liabilities could be determined and collection devices preserved (Matter of Giovanni Velez, Tax Appeals Tribunal, May 26, 1988) and to provide a mechanism whereby a purchaser could obtain clear title to the assets free of any latent tax obligations, the provisions of section 1134(a)(4) of the Tax Law addressed specifically to bulk purchasers also establish a separate basis for the obligation to register and file.

D. Given the multiplicity of bases for requiring petitioner to file returns (direct paying customer, vendor and bulk purchaser), it must now be determined whether petitioner satisfied the filing requirement for the quarter ending May 31, 1982. No proof was brought forward to establish a filing solely by or for petitioner. Instead, petitioner seeks a conclusion that a return which bore neither its name nor identification number and which was filed 18 months before it was registered as a vendor commences the period of limitation for the assessment of sales tax against petitioner. The theory is premised upon the fact that since both the seller and petitioner were obligated to file sales and use tax returns for their activities during portions of the quarter ending May 31, 1982, that the single return, allegedly reporting both the sales and purchases subject to tax from both corporations, fulfilled the reporting obligations of each under the law. The plain reading of the law can permit no such conclusion. The provisions of the Tax Law regarding registration and filing are clear and unambiguous. Certificates of authority are issued to single entities and are not assignable or transferable. (Tax Law § 1134[a].) That being the case, it would be inconsistent to find that a return filed in accordance with the authority issued to the predecessor corporation was somehow transferable. Since petitioner was not registered and since the return filed for the quarter ending May 31, 1982 apparently did not indicate either the name or identification number of petitioner, it is clear that the document filed was intended and had the legal effect of being a return for the predecessor corporation. Therefore, it is concluded that petitioner did not file a return for the quarter ending May 31, 1982.

E. Finally, the alternative ground advanced by petitioner is also rejected. No authority has been demonstrated for the theory that filings for other quarters or notations on assessment documents issued to other parties satisfy the responsibility of a vendor to file a return for an earlier quarter. Tax Law § 1147(b) provides that a notice such as at issue here must be issued within three years from the filing of the tax return. However, that section also provides that this three-year period of limitation does not apply where no return has been filed, and an assessment may be issued at any time in such instances. Indeed, given the absence of a return together with the failure to properly and timely notify the former State Tax Commission of the bulk transfer, compounded by an 18-month delay in registering, petitioner can not now be heard to say that

the Division failed to act in a timely fashion in issuing the assessment for the taxes due on the unreported transaction.

F. The petition of WIXT-TV Inc. is denied and the Notice of Determination and Demand for Sales and Use Taxes Due dated March 13, 1987 as recomputed by the Conciliation Order dated February 19, 1988 is sustained.

DATED: Troy, New York
October 12, 1989

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE